

**Milton College and Milton College Faculty Association, Local 4094, WFT, AFL-CIO. Case 30-CA-5860**

February 22, 1982

**DECISION AND ORDER**

BY CHAIRMAN VAN DE WATER AND  
MEMBERS FANNING AND ZIMMERMAN

Upon a charge filed on May 29, 1980, by Milton College Faculty Association, Local 4094, WFT, AFL-CIO, herein called the Union, and duly served on Milton College, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 30, issued a complaint on February 6, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 20, 1979, following a Board election in Case 30-RC-3557,<sup>1</sup> the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; and that, commencing on or about May 5, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On February 12, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On October 21, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on October 23, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause, denominated as its "Argument in Opposition to Motion for Summary Judgment," incorpo-

rating an affidavit by Respondent's dean. On November 18, 1981, counsel for the General Counsel filed a motion to strike Respondent's affidavit, and also filed a "Response to Respondent's Opposition to Motion for Summary Judgment."

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

**Ruling on the Motion for Summary Judgment**

In its answer to the complaint and opposition to the General Counsel's Motion for Summary Judgment, Respondent asserts that the unit herein is inappropriate and that the General Counsel is not entitled to summary judgment in this matter because there is a genuine issue of fact and of law to be determined. Thus, while Respondent admits certain factual allegations of the complaint, including the May 5, 1980, denial of the Union's requested commencement of bargaining, it contends in effect that the decision by the Supreme Court in *N.L.R.B. v. Yeshiva University*, 444 U.S. 672 (1980), holding certain faculty members to be managerial in status, renders the previously stipulated unit herein inappropriate. In support of its position regarding the managerial status of its faculty members which would bring them under the rubric of *Yeshiva, supra*, Respondent asserts in a sworn affidavit that the faculty members included in the unit have complete authority to determine curriculum, to set admission policies and matriculation standards, to control retention policies, grading policies, and actual grading, and to determine which students graduate and which do not. Further, Respondent asserts that the faculty has complete control over, *inter alia*, faculty hiring, determination of tenure policies, faculty sabbaticals, termination and promotion of faculty, and the selection and evaluation of chairpersons and department heads. Additionally, Respondent asserts that the faculty has "great authority and influence over": faculty salaries, departmental budgets, faculty evaluations, faculty grievances, and leaves of absence. Respondent further contends that the authority and managerial status of the faculty is presented "as of the present date as well as the date that the initial bargaining unit was determined."

Counsel for the General Counsel argues that Respondent's reliance on *Yeshiva* is untimely, that Respondent must be deemed to have waived such argument, that there are no special circumstances which would require any reexamination of the representation case, and that Respondent should thus

<sup>1</sup> Official notice is taken of the record in the representation proceeding, Case 30-RC-3557, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

not now be permitted to present any such evidence.

We find no merit in the General Counsel's arguments. We conclude that the Supreme Court's decision in *Yeshiva* constitutes a substantial change in the state of the law regarding the supervisory and/or managerial status of faculty members which warrants the holding of a hearing on the appropriateness of the unit.<sup>2</sup> There is no allegation here that Respondent has made changes in the duties or the authority of faculty members. The General Counsel apparently concedes that the issue here is not the relitigation of an issue previously decided, but rather in effect presents an issue not previously litigated. While the General Counsel asserts that Respondent has effectively waived litigation of the appropriateness of the unit, we agree with Respondent that waiver implies knowledge of a right before it can be waived. In this connection, we do not agree with the General Counsel that Respondent can be held to have knowledgeably waived a court decision which issued some 9 months following the initial stipulation herein. Counsel for the General Counsel also asserts that the affidavit of Respondent's dean should be stricken because Dean Collins had been employed only a few

months when the certification issued, and Collins could not have had sufficient time to determine the faculty's actual duties and authority in that short amount of time, and is "not qualified to proffer evidence regarding the duties and authority of faculty prior to" June 1979. The General Counsel further asserts that if the Board does not strike Collins' affidavit little, if any, weight should be given to it. We reject these arguments. To the extent that the General Counsel's position is intended to challenge the factual assertions in Respondent's affidavit, it would appear that it also puts in issue both factual and legal questions requiring further resolution.

Accordingly, we shall deny the General Counsel's Motion for Summary Judgment, and remand the instant proceeding to the Regional Director to arrange for a hearing concerning the appropriate unit.

#### ORDER

It is hereby ordered that the General Counsel's Motion for Summary Judgment herein, and his motion to strike Respondent's affidavit incorporated in its "Argument in Opposition To Motion for Summary Judgment" shall be, and they hereby are, denied.

IT IS FURTHER ORDERED that Case 30-CA-5860 be remanded to the Regional Director for further appropriate action.

<sup>2</sup> The parties stipulated to the faculty unit in May 1979. The election was conducted pursuant to a Stipulation for Certification Upon Consent Election, and certification issued September 1979. The Court's decision in *Yeshiva*, in February 1980, postdated the certification but apparently preceded the Union's request for bargaining.